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January 14, 2008

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: September 11, 2007

Case Number: TSO-0541

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (hereinafter "the individual") for access authorization.¹ The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the individual should be granted access authorization. As discussed below, I find that access authorization should be granted in this case.

I. BACKGROUND

This administrative review proceeding began with the issuance of a notification letter by a Department of Energy (DOE) Local Security Office (LSO), informing the individual that information in the possession of the DOE created a substantial doubt pertaining to his eligibility for an access authorization in connection with his work. In accordance with 10 C.F.R. § 710.21, the notification letter included a statement of the derogatory information causing the security concerns.

The letter cites a report of February 2, 2007, by a DOE consultant psychiatrist (consultant psychiatrist) who diagnosed the individual as suffering from "impulse control disorder, not otherwise classified." The impulse control disorder related to the

1/ Access authorization (or security clearance) is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5.

individual's use of his home and work computers to view pornography. It was the consultant psychiatrist's opinion that this is a mental condition which causes or may cause a defect in judgment or reliability. Specifically, the DOE consultant psychiatrist stated that "while [the individual] is doing quite well right now, there are some features which suggest that there may be at least a small risk of a lapse of judgment or reliability."

The notification letter also states that in 2004, at a prior DOE work site in City #1, the individual was "caught viewing pornography on [his] computer at work." Furthermore, according to the letter, at this same time, the individual was viewing pornographic sites at home for two to three hours a day. The letter also indicates that after the discovery that he was using his work computer to access pornography, the individual received some counseling and attended a 12-step support group. Shortly thereafter, he moved to the city where he currently lives and works. He briefly attended a new support group in that new city, but did not continue with it for very long. He continued to access pornographic sites in his new home, until the sites were blocked by his wife. He stated that "if I had unrestricted access to the computer, I could very well be going back to [pornography]." Transcript of Personnel Security Interview of August 15, 2006 (PSI Tr.) at 67. According to the notification letter, the diagnosis by the DOE consultant psychiatrist and the additional facts raise a security concern under 10 C.F.R. § 710.8(h)(Criterion H).

The notification letter informed the individual that he was entitled to a hearing before a Hearing Officer, in order to respond to the information contained in that letter. The individual requested a hearing, and that request was forwarded by the LSO to the Office of Hearings and Appeals (OHA). I was appointed the Hearing Officer in this matter. In accordance with 10 C.F.R. § 710.25(e) and (g), the hearing was convened.

At the hearing, the individual testified on his own behalf, and presented the testimony of his wife, his supervisor, an employee whom the individual supervises (subordinate), and a psychologist (individual's psychologist). The DOE Counsel presented the testimony of the DOE consultant psychiatrist.

II. Hearing Testimony and Post-Hearing Documentary Evidence

A. The Individual

The individual admitted that he has an attraction to pornography. Transcript of Hearing (Tr.) at 110. He testified that he accessed pornography sites from his work computer during 2004, when he lived in city #1. Tr. at 87,89. He has also admitted viewing such sites from his home computer. PSI Tr. at 63. The individual testified that after "getting caught" at work in 2004, he never again used his work computer to view pornography, and "cannot conceive" of doing so ever again. Tr. at 95. See also, Tr. at 87, 90. He is committed to having a filter in place on his home computer that will prevent him from accessing such sites if temptation arises. Tr. at 115, 160. He stated that he has not tried to access pornography on his home computer since early 2005. At that time, the filter was in place and the attempt was unsuccessful. Tr. at 108. The individual testified that he is attending a therapy/accountability group in his current city, and he finds this helpful. Tr. at 92. He is committed to continuing his involvement with this group. Tr. at 93.

The individual testified that he now has a system in place to deal with the stress that heretofore might have caused him to seek relaxation through viewing pornography. He stated that he works out, takes walks, and participates in his accountability group. He uses his home computer now to access newspapers, and editorial magazines on the subjects of politics, current events and science. Tr. at 159-60.

B. The Individual's Wife

The individual's wife stated that she discovered the individual accessing pornography web sites on their home computer on two occasions in the late 1990's and on one occasion in October or November 2004, shortly after they moved to their current city. Tr. at 42, 50. She was very disappointed by this behavior. Tr. at 43. Shortly after the 2004 incident, she had the computer filter installed. She testified that the individual does not have access to the unfiltered computer, and that she is the only person in the household that has the password for the filter. Tr. at 52. She was confident that the individual has not used their home computer to view pornography for three years. She confirmed that the individual has attended group counseling sessions in city #1 and is continuing to do so in their current city. Tr. at 43-49.

C. Individual's Colleague/Subordinate

This witness stated that the individual has been his manager and colleague at various times during the past several years. Tr. at 69-70. He stated that currently the individual's work computer is in plain view, and his door is not closed. He passes the individual's office frequently during the work day, and has never seen any evidence of pornography on the individual's computer. Tr. at 71-72. He has never known the individual to engage in unreliable behavior. Tr. at 72. This witness indicated that the individual spoke to him about his pornography issues at home and at work, the home computer blockers, and his help group. Tr. at 76-81.

D. Individual's Supervisor

The individual's supervisor has known the individual since 1993 and has worked with him in his current position in his current city since "2003,2004." Tr. at 28. The supervisor describes the individual as doing a good job and as a responsible employee. Tr. at 10, 12-16. He was aware of the inappropriate use of the computer by the individual at his prior employment. Tr. at 23. He stated that the individual has been trustworthy, and that he has seen no evidence in the individual of impulsiveness, inappropriate use of the computer, or other inappropriate behavior at work. Tr. at 34-36. He indicated that he and the individual do not socialize outside of work. Tr. at 29.

E. Individual's Psychologist²

The individual's psychologist stated that he spent approximately four hours evaluating the individual. Tr. at 117. He believes that the individual's attraction to pornography arises from an anxiety problem that was exacerbated during the time of the individual's relocation from city #1 to his present city. Tr. at 124-126. He believes that the individual has help in controlling stress through his accountability group, and that the once-a-week meeting is a good frequency for him. Tr. at 126-128, 130. He testified that the individual can find the "soothing" he seeks in his accountability group. Tr. at 132. He also believes that the individual could benefit from some individual therapy, but it is not obligatory. Tr. at 128, 144. Overall, the individual's psychologist believes that

2/ The individual submitted for the record his psychologist's written evaluation dated November 26, 2007. Email of November 30, 2007.

there is a "low" risk that the individual will return to viewing pornography at home, even if the filter were not in place, because the personal cost to his lifestyle is too great. Tr. at 137. He puts the risk at 10-20 percent at home. *Id.* He stated that the risk that the individual will use his work computer for this purpose is "essentially zero." Tr. at 138.

F. The DOE Consultant Psychiatrist

The DOE consultant psychiatrist disagreed with the anxiety disorder diagnosis of the individual's psychologist, and affirmed his diagnosis that the individual has an impulse control disorder. Tr. at 145. He believed that the individual would show poor judgment if he returned to viewing pornography at home because of the trauma it would cause his wife. Tr. at 149, 154. The DOE consultant psychiatrist characterized the risk that the individual would use his work computer to access pornography as "zero." Tr. at 153. With respect to the risk that the individual would return to home-viewing of pornography, the DOE consultant psychiatrist gave inconsistent and wavering testimony. He stated that the risk was "small to perhaps moderate." Tr. at 149. He then stated that without a filter the risk was "small but significant." Tr. at 150.

Later, the DOE consultant psychiatrist testified that the risk at home was "low." Tr. at 158.

G. Post-Hearing Documentary Evidence

After the hearing, the individual submitted records showing his activity on his work computer during the period January 2007 through November 2007. Submission of December 14, 2007. These records indicate no access of inappropriate sites from this computer.

III. Applicable Standards

A DOE administrative review proceeding under 10 C.F.R. Part 710 is not a criminal case, in which the burden is on the government to prove the defendant guilty beyond a reasonable doubt. In this type of case, we apply a different standard, which is designed to protect national security interests. A hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The burden is on the individual to come forward at the hearing with evidence to convince the DOE that granting or restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(d).

This standard implies that there is a strong presumption against the granting or restoring of a security clearance. See *Dept of Navy v. Egan*, 484 U.S. 518, 531 (1988) (the "clearly consistent with the interests of the national security test" for the granting of security clearances indicates "that security-clearance determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990) (strong presumption against the issuance of a security clearance). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. *Personnel Security Hearing* (Case No. VSO-0002), 24 DOE ¶ 82,752 at 85,511 (1995).

Once a security concern has been found to exist, the individual has the burden of going forward with evidence to rebut, refute, explain, extenuate or mitigate the allegations. *Personnel Security Hearing* (VSO-0005), 24 DOE ¶ 82,753 (1995), *aff'd*, 25 DOE ¶ 83,013 (1995). See also 10 C.F.R. § 710.7(c).

IV. Analysis

The issue in this case is whether the individual has mitigated the Criterion H security concerns set forth in the notification letter.

As discussed above, the individual's psychologist testified that the individual has an anxiety disorder, whereas the DOE consultant psychiatrist found that the individual suffers from a "compulsion."

Tr. at 145. I need not determine which condition, if either, the individual suffers from. Rather, I must decide whether the concerns regarding the individual's judgment and reliability arising from his viewing of pornography have been resolved. As discussed below, I find that the individual has mitigated the concerns.

As an initial matter, there was strong testimony from the individual's wife and colleagues that he is no longer accessing pornography either from his work or his home. The testimony regarding the filter on the individual's home computer was especially convincing regarding the individual's contention that he has not attempted to access pornography from his home computer since the early 2005 unsuccessful attempt.³ The submission of his work

3/ I am giving no credence to a statement the consultant psychiatrist made in his report to the DOE that seems to contradict the individual's testimony on this point. The report states that the individual told the psychiatrist he last tried to access pornography on his home computer "a few months ago." Since the report was dated February 2, 2007, this alleged last access attempt would have occurred sometime in 2006. Given the psychiatrist's overall wavering testimony and the vagueness of his assertion of the date of the last access, I do not find it credible. I believe the individual

computer records for the period January through November 2007 was strong additional corroborative evidence that the individual has not used his work computer for this purpose. Thus, I am convinced that the individual has not accessed pornography from home for more than two years and has not accessed pornography at work since he was "caught" in 2004, or more than three years ago. These periods of time are significant and, based on them, I find that the individual has shown a willingness and ability to control the behavior which caused a concern regarding his judgment.

Furthermore, the testimony of the individual's psychologist regarding the likelihood that the individual will return to such use in the future was convincing. The individual's psychologist characterized the risk at work as essentially zero. The individual's psychologist testified strongly that the risk at home was "low," meaning 10 to 20 percent. The consultant psychiatrist's testimony was, overall, less assured. His testimony wavered and was inconsistent. He was unable to readily explain what he meant by a statement in his own report regarding the level of risk of lapse of judgment. Tr. at 147-150. Nevertheless, by the end of the hearing, the consultant psychiatrist seemed to believe the risk of home access was low, and there was no risk of the individual's using his work computer to view pornography. I find the testimony of the experts supports my conclusion that there is a low risk of the individual's relapsing and seeking out pornography web sites in the future.

There is further reason I believe that the individual will refrain from seeking out pornography. He is sensitized to the trauma and hardship that this would cause his wife and family if he were to do so. This is further motivation for him. Moreover, the individual testified convincingly about the techniques that he uses on a regular basis to control stress, including the accountability group. I believe that he will continue to rely on those outlets in the future.

was more believable on the date of his last attempted access. The individual was well aware of the filter that was in place on his home computer. I see no reason why he would have attempted to test its effectiveness as recently as 2006.

V. CONCLUSION

I am convinced that the individual has not accessed pornographic sites for several years. He has strong motivation not to access such sites, and a strong support system in place to help keep him from doing so in the future. There is convincing testimony from experts that the risk of return to the earlier judgment problem is low. Accordingly, I find that the Criterion H security concern has been resolved. It is therefore my decision that the individual should be granted access authorization.

The parties may seek review of this Decision by an Appeal Panel under the regulation set forth at 10 C.F.R. § 710.28.

Virginia A. Lipton
Hearing Officer
Office of Hearings and Appeals

Date: January 14, 2008